SUPREME COURT, U. S.

FILED

4 1971

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 819

SHELDON SHIPLEY OWINGS,

Petitioner,

v.

STATE OF MARYLAND,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF SPECIAL APPEALS OF MARYLAND

BRIEF IN OPPOSITION

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The Daily Record Co., Baltimore, Md. 21202

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OPINION BELOW

On May 11, 1970, the Court of Appeals of Maryland denied a Petition for Writ of Certiorari to the Court of Special Appeals of Maryland in the case of *Owings v. State*, 8 Md. App. 572, 261 A. 2d 223 (1970). The Order denying Certiorari appears in the Record at p. , Petitioner's Appendix B. The Opinion of the Court of Special Appeals of Maryland is reported and further set out in Petitioner's Appendix A.

JURISDICTION

The jurisdiction of this court is invoked under 28 U.S.C. 1257 (3). The Opinion of the Court of Special Appeals of Maryland in *Owings v. State, supra*, filed on January 28, 1970, affirmed the May 1, 1969, judgment and sentence of the Criminal Court of Baltimore. The Order denying Certiorari to the Court of Special Appeals of Maryland was entered on May 11, 1970, by the Court of Appeals of Maryland.

CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States

[Amendment IV]

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

[Amendment XIV]

Section 1.

All persons born or naturalized in the United States and subject to the Jurisdiction thereof, are citizens of the United States and of the States wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

QUESTION PRESENTED

Whether there was a denial of the Petitioner's rights under the Fourth Amendment of the Constitution, applied to the sovereign states under the Fourteenth Amendment, when the police searched his vehicle and arrested him and the fruits of that search were later admitted into evidence at his trial.

STATEMENT OF THE CASE

The Petitioner was tried under Indictment 140 of the January Term, 1969, of the Criminal Court of Baltimore, before the Honorable George D. Solter, sitting non-jury, and was convicted of possession and control of marijuana for which he received a sentence of four (4) years' imprisonment.

The Petitioner appealed to the Court of Special Appeals of Maryland, which affirmed the lower court in *Owings v. State, supra*, holding specifically, that the Petitioner had not been denied his rights under the Fourth Amendment of the United States Constitution. The Petitioner sought a Writ of Certiorari in the Court of Appeals of Maryland, which was denied on May 11, 1970.

The facts surrounding the Petitioner's conviction are not disputed. At approximately 6:00 p.m., December 28, 1968, Sergeant Stephen Tabeling of the Baltimore City Police received a telephone call from a narcotic informant. Sergeant Tabeling, a 16 year veteran who spent the last two years with the narcotic squad, repeated the informant's tip, as well as the reasons why he believed the informant (T. 6, 7):

> "At about 6:00 p.m. December 28th, 1968, I received a call from a reliable informant. This informant is known to me. This informant is a former drug addict. I know this of my own knowledge. This informant at

this time had furnished me information which had led to the arrest and conviction on one subject for the possession of marijuana and burglary, on two others for possession of heroin and on two others for possession of marijuana. He had also supplied me information that had led to the recoveries of various amounts of drugs. Two of these people that he furnished me information on were convicted in this court last week. I received information from the informant that a man by the name of Sheldon Owings, who was a white male, had reddish color hair, had a red beard would come to 11 Elmwood Road at about 7:00 p.m. on the night of the 28th. In his possession he would have two kilos of marijuana. He would also have approximately one hundred pills of mescaline, which is an hallucigenic drug. . . ."

"I was told that Mr. Owings would be driving a Volkswagen which was light in color and had the appearance of a Volkswagen bus and that it would have foreign tags on it."

At the time Sergeant Tabeling received this call, he was located at Northern District Police Station at Keswick and 34th Streets in Baltimore. The suspect was supposed to arrive at 11 Elmwood Road at approximately 7:00 p.m. that same night, a distance of approximately a mile and a half from the Northern District. Sergeant Tabeling testified that he did not have time to prepare and execute a search warrant in time to intercept the suspect. He indicated that he had less than one hour to obtain the warrant because he would have had to be at the rendezvous before 7:00 p.m. in case the suspect arrived earlier (T. 22-23).

Sergeant Tabeling testified that he went to the intersection of Midvale and Longwood Roads in Baltimore where he could observe 11 Elmwood Road. At approximately 7:30 p.m., at the precise location specified, he saw the

Petitioner drive up in a grey Volkswagen with foreign tags. He noted that the Petitioner was a man driving the bus and had a reddish colored beard and hair. Sergeant Tabeling approached the vehicle as the Petitioner was in the process of backing into a driveway, and identified himself to the Petitioner as a police officer. He told the Petitioner that he was going to search his vehicle for marijuana and mescaline and thereafter went to the rear of the vehicle and found two kilos or bricks of marijuana. In the glove compartment of the vehicle he found approximately 79 capsules containing a bluish-green powder. The Petitioner was arrested and transported to the Northern District Police Station (T. 4, 14, 15, 23).

In ruling on the legality of the search and seizure, the trial judge, the Honorable George D. Solter, said (T. 12):

> "I just had occasion to go into the Spinelli case somewhat yesterday and the issue, of course was corroboration of the informant's information and it seemed — it does seem to me that the corroboration of the information and the reliability of the informant is present in the actual events that took place before he accosted the Defendant and searched the vehicle. So, for those reasons, I will overrule your objection, Mr. Garrity."

After the ruling of the trial judge, the seized kilos of marijuana were admitted into evidence. The Petitioner presented no testimony and was convicted of possession and control of marijuana.

ARGUMENT

THE SEARCH OF THE PETITIONER'S VEHICLE AND HIS ARREST WERE NOT UNCONSTITUTIONAL.

The Petitioner claims [sic] that the Court of Special Appeals of Maryland has violated his constitutional rights under the Fourth Amendment by affirming the decision of

the lower court which upheld the validity of the search of his car and his arrest. The Respondent will confine its discusssion to the premise that the actions of the Baltimore police in searching Petitioner's vehicle and arresting him did not violate his constitutional rights because the police had probable cause to believe that the vehicle contained contraband (prohibited narcotics) and that the Petitioner was in possession or control thereof.

In *Chambers v. Maroney*, U.S. , 26 L. Ed. 2d 419, S. Ct. (1970), this court reviewed the circumstances justifying a warrantless search of a vehicle. In doing so, it reaffirmed its holding in *Carroll v. United States*, 267 U.S. 132, 158-159, 69 L. Ed. 543, 554, 45 S. Ct. 280 (1925), that the measure of legality of a vehicle seizure is *the seizing officer must have reasonable or probable cause for believing that the vehicle which he stops contains contraband or other contents which offend against the law. Dyke v. Taylor Implement Manufacturing Company*, 391 U.S. 216, 20 L. Ed. 2d 538, 88 S. Ct. 1472 (1968);* *Brinegar v. United States*, 338 U.S. 160, 93 L. Ed. 2d 1879, 69 S. Ct. 1302 (1949). The court was careful to point out in *Chambers*, 26 L. Ed. 2d 428, that it was not unequivocally sanctioning warrantless searches of vehicles:

> "Neither Carroll, supra, nor other cases in this Court require or suggest that in every conceivable circumstance the search of an auto even with probable cause may be made without the extra protection for privacy which a warrant affords. But the circumstances which furnish probable cause to search a particular auto for particular articles are most often unforeseeable; moreover, the opportunity to search is fleeting since a car is readily movable. Where this is true, as in Carroll and the case before us now, if an effective search is to

* In *Dyke*, this court recognized that because of the mobility of the automobile it may be subjected to a warrantless search upon facts that would not justify such a search of a dwelling or office.

> be made at any time, either the search must be made immediately without a warrant or the car itself must be seized and held without a warrant for whatever period is necessary to obtain a warrant for the search. . . . For constitutional purposes, we see no difference between on the one hand seizing and holding a car before presenting the probable cause issue to a magistrate and on the other hand carrying out an immediate search without a warrant. Given probable cause to search, either course is reasonable under the Fourth Amendment." (Footnote omitted.)

Comparing this court's holdings in *Chambers*, *Dyke*, and *Carroll* to the case at bar, if Sergeant Tabeling had probable cause to conduct a warrantless search of the Petitioner's vehicle, whether he searched the vehicle immediately upon stopping it, or held it for the purpose of obtaining a warrant from a magistrate, there was no violation of the Petitioner's constitutional rights.

Whether the informant's tip in this case, when coupled with Sergeant Tabeling's personal observations, supplied him with sufficient probable cause to make a warrantless search of Petitioner's vehicle is controlled by this court's holding in *Draper v. United States*, 358 U.S. 307, 3 L. Ed. 2d 327, 79 S. Ct. 329 (1959). There a "special employee" (informer) of the Federal Narcotics Bureau in Denver told a Federal narcotic agent that Draper had gone to Chicago by train and was going to return to Denver with three ounces of heroin on September 8 or 9, 1956. Although the "special employee" gave the narcotic's agent no indication as to how his information was obtained, he did give the agent a detailed description of Draper, including the clothing he would be wearing and that he would be carrying a "tan zipper bag" and walking "real fast." The agent and Denver police went to the Denver station on September 8 but did not see anyone fitting Draper's description.

On September 9 they returned and saw a person matching the physical description of Draper, wearing the precise clothing described by the informer, arrive on an incoming Chicago train with the tan zipper bag and begin walking "fast toward an exit." The suspect was arrested and found carrying two envelopes of heroin.

In upholding the validity of the warrantless search, this court held at 358 U.S. 312-313:

> "The information given to narcotic agent Marsh by 'special employee' Hereford may have been hearsay to Marsh, but coming from one employed for that purpose and whose information had always been found accurate and reliable, it is clear that Marsh would have been derelict in his duties had he not pursued it. And when, in pursuing that information, he saw a man, having the exact physical attributes and wearing the precise clothing and carrying the tan zipper bag that Hereford had described, alight from one of the very trains from the very place stated by Hereford and start to walk at a 'fast' pace toward the station exit, Marsh had personally verified every facet of the information given him by Hereford except whether petitioner had accomplished his mission and had the three ounces of heroin on his person or in his bag. And surely, with every other bit of Hereford's information being thus personally verified, Marsh had 'reasonable grounds' to believe that the remaining unverified bit of Hereford's information — that Draper would have the heroin with him — was likewise true.
>
> "'In dealing with probable cause, . . . as the very name implies, we deal with probabilities. These are not technical: they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act.' Brinegar v. United States, supra (338 U.S. at 175). Probable cause exists where 'the facts and circumstances within [the arresting officers'] knowledge and of which they had reasonably trustworthy information [are] sufficient

in themselves to warrant a man of reasonable caution in the belief that' an offense has been or is being committed. Carroll v. United States, 267 U.S. 132, 162, 69 L. ed. 543, 555, 45 S. Ct. 280, 39 A.L.R. 790.

"We believe that, under the facts and circumstances here, Marsh had probable cause and reasonable grounds to believe that petitioner was committing a violation of the laws of the United States relating to narcotic drugs at the time he arrested him."

This court's most recent case discussing search and seizure based on an informant's tip is *Spinelli v. United States*, 393 U.S. 410, 21 L. Ed. 2d 637, 89 S. Ct. 584 (1969) which considered the validity of a search warrant. In that case the affidavit of probable cause recited the tip as follows:

"The Federal Bureau of Investigation has been informed by a confidential reliable informant that William Spinelli is operating a handbook and accepting wages and disseminating wagering information by means of the telephones which have been assigned the numbers WY DOWN 4-0029 and WY DOWN 4-0163." Appendix to Opinion of the Court.

The Affidavit went on to relate that Spinelli was seen thereafter on five separate days in August of 1965 driving in and about East St. Louis, Illinois, and St. Louis, Missouri; going to an apartment which the Telephone Company had revealed contained the two telephones; and that the agent knew Spinelli was a bookmaker and an associate of bookmakers and gamblers.

The court concluded that the affidavit lacked sufficient probable cause for the issuance of the warrant because (a) the affiant offered no reasons in support of his conclusion that the informant was reliable and (b) there was nothing in the informant's tip that would show the

"underlying circumstances" from which the informant could conclude that Spinelli was running a bookmaking operation. In discussing possible ways to provide the magistrate with some details of the manner in which the informant's knowledge was gathered, this court said that *Draper* should be the appropriate model. 393 U.S. 416-418:

> "The detail provided by the informant in Draper v. United States, 358 U.S. 307, 3 L. Ed. 2d 327, 79 S. Ct. 329 (1959), provides a suitable benchmark. While Hereford, the Government's informer in that case, did not state the way in which he had obtained his information, he reported that Draper had gone to Chicago the day before by train and that he would return to Denver by train with three ounces of heroin on one of two specified mornings. Moreover, Hereford went on to describe, with minute particularity, the clothes that Draper would be wearing upon his arrival at the Denver station. A magistrate, when confronted with such detail, could reasonably infer that the informant had gained his information in a reliable way.
>
> "Nor do we believe that the patent doubts Aguilar raises as to the report's reliability are adequately resolved by a consideration of the allegations detailing the FBI's independent investigative efforts. . . . Once again, Draper provides a relevant comparison. Independent police work in that case corroborated much more than one small detail that had been provided by the informant. There, the police, upon meeting the inbound Denver train on the second morning specified by informer Hereford, saw a man whose dress corresponded precisely to Hereford's detailed description. It was then apparent that the informant had not been fabricating his report out of whole cloth; since the report was of the sort which in common experience may be recognized as having been obtained in a reliable way, it was perfectly clear that probable cause had been established. (Footnotes omitted.)"

Using *Draper* as a bench mark to determine whether Sergeant Tabeling's informant here was reliable and that he had obtained his information in a reliable way, the following analysis reveals that *Draper* and *Owings* are virtually congruent:

The Informant was Reliable

In *Draper* the informer was a paid "special employee" who, from time to time, had given the agent 'information" regarding violations of narcotic's laws which was always found reliable. In *Owings* the informant was a former drug addict whose information on prior occasions was so reliable that it had led to the arrest and conviction of five people for violations of narcotic's laws relating to marijuana and heroin and in addition, had led to the recovery of various amounts of drugs. The conclusion is inescapable, therefore, that the informant in *Owings* was as reliable as the informer in *Draper*.

The Informant's Information was Reliable.

In *Draper*, although the informer did not state how he had obtained his information, he described with "minute particularity", (a) that Draper would arrive by train from Chicago on one of two days; (b) that he would be wearing specific clothing; (c) that he would be carrying a tan zipper bag and walking fast, and that he would have in his possession heroin. The court concluded that this information would support the reasonable inference that the informant had gained his information in a reliable way. In *Owings*, although the informant did not state how he had obtained his information, he described with "minute particularity" that, (a) within one hour of the phone call, the Petitioner would be at 11 Elmwood Road in Baltimore; (b) that he was a white male with red hair and a red beard; (c) that he would be driving a light colored Volkswagen bus with foreign tags, and (d) that he would be transporting two kilos of marijuana and a quantity of mescaline.

The conclusion is inescapable that, if a magistrate were to have been confronted with such detail, the only reasonable inference would be that the informant had gained his information in a reliable way.

The Informant's Tip was Corroborated.

In *Draper*, this court concluded that the police had corroborated the informer's report when they met the Chicago to Denver train on the second morning and observed a man who precisely matched the description of Draper given by the informer carrying the zipper bag and walking fast as the informer claimed. Likewise, in *Owings*, Sergeant Tabeling went to the exact location specified and at the precise moment forecast by the informant and saw a man matching Owings' description arrive driving the vehicle described by the informer.

It is respectfully submitted, therefore, that Sergeant Tabeling would have been derelict in his duties if he did not pursue the information furnished by his informant, the rehabilitated narcotic addict, whose information had always been accurate and reliable. Furthermore, when pursuing the information, he saw a man with the exact physical attributes and driving the same vehicle at the precise time and location advised by the informant. Sergeant Tabeling personally verified every facet of the information, except whether the Owings' vehicle did, in fact, contain two kilos of marijuana and a quantity of mescaline. With every other bit of the information personally verified by Sergeant Tabeling he had reasonable, if not compelling grounds to believe that the remaining portion of the tip, *i.e.*, that Owings would have the marijuana and mescaline in the Volkswagen bus, was also true. *Draper, supra*, 358 U.S. 312. Accordingly, his action in searching the vehicle and the Petitioner in the light of

the constitutionally adequate "reasonable grounds" did not violate the Petitioner's Fourth Amendment rights.

CONCLUSION

It is respectfully submitted, based on the reasons set forth above, that Certiorari should be denied.

Respectfully submitted,

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PROOF OF SERVICE

I, Robert A. DiCicco, one of the attorneys for the State of Maryland, Respondent herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on February 3, 1971, I served copies of the foregoing Brief in Opposition to the Petition for Writ of Certiorari on the several parties thereto as follows:

(1) On the Petitioner, by mailing a copy in a duly addressed envelope, with first class postage prepaid, to his respective attorneys of record as follows:

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